Testimony of Laurence H. Tribe*
on the
FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT of 2003 ("FAIR Act)
before the
Senate Judiciary Committee

June 4, 2003

It is an honor and a pleasure to testify at the invitation of the Committee today. I am here to address the constitutional issues raised by the Fairness in Asbestos Injury Resolution Act of 2003 (the "FAIR Act"). This legislation would create a five-judge federal court under Article I of the Constitution (§ 101 of the bill) to adjudicate asbestos claims on a no-fault basis (§ 112). Claimants would be required to prove by a preponderance of the evidence that they have an eligible disease or condition (§ 113) and that they meet certain diagnostic, medical and latency criteria that have been borrowed from the Manville Trust Distribution Process. (§§ 121-25). Awards would be made according to a compensation schedule depending on the severity of a claimant's condition (§ 131). For example, claimants with asymptomatic exposure or minor pleural disease would receive only medical monitoring benefits. Mesothelioma victims would receive $750,000. There is no provision for punitive damages. If a claimant disagreed with the compensation decision, he or she could seek en banc review in the asbestos court, followed by appeal in the D.C. Circuit under an arbitrary and capricious standard, and then Supreme Court review by way of a petition for writ of certiorari (§ 141(a)(1)(B), § 301(b)(3)(A), § 301(b)(4)).

The FAIR compensation scheme would displace existing federal and state laws governing asbestos claims, except workers' compensation and veterans' benefits laws. All pending asbestos claims that have not yet reached final judicial judgments would be subject to dismissal. (§ 403). The cases could be re-filed in the new asbestos court. (§ 111(c)(2)). The scheme would be financed by assessments against companies with asbestos liabilities and against insurers. (§§ 202-03, 211-13). Each of these two groups would be required to contribute $45 billion. The fund would be authorized to impose (1) a further $14 billion in assessments on certain "additional contributing participants," which are defined as companies whose liability and defense costs are less than $1 million and which are likely to avoid future civil liability as a result of the FAIR Act (§ 225), and (2) an additional $4-6 billion in assessments on trusts established to compensate asbestos claims, including trusts established under Section 524(g) of the Bankruptcy Code. (§ 402 of the bill).

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* Tyler Professor of Constitutional Law, Harvard Law School. The opinions expressed here are my own as a scholar of constitutional law and do not purport to reflect the views of Harvard Law School. I am appearing today on behalf of myself and not on behalf of any entity or organization, and I am especially grateful to two splendid lawyers whose talents and energies I have been privileged to harness on this as on other challenging occasions, Jonathan Massey and Tom Goldstein. Their painstaking and wide-ranging research under unusually pressured time constraints contributed vitally to this written submission.

My conclusion, in brief, is that the FAIR Act is well within Congress' authority to enact and does not offend the constitutional guarantees of due process, equal protection, or right to jury trial. Nor does it represent an uncompensated taking of private property, an unconstitutional impairment of contracts, or a violation of the separation of powers. I will suggest some relatively minor ways in which the bill could be strengthened – by, for example, including explicit congressional findings to support the exercise of Congress' power under the Commerce Clause. But the FAIR Act is already comfortably within constitutional limits.

Introduction

Before I develop these points at length, it is worth noting that I come before the Committee with a distinctive perspective on asbestos litigation, having briefed, argued, and prevailed in the two landmark Supreme Court decisions invalidating attempts at *judicial* asbestos settlements: *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). While some might suppose that these judicial decisions cast a cloud over the FAIR Act, the reality is quite different. In fact, *Amchem* and *Ortiz* strongly *support* the propriety of what Congress is being asked to do here.

In *Amchem*, the Supreme Court recognized the need for legislation to address what it called the "asbestos-litigation crisis." 521 U.S. at 597. The Court quoted extensively from the report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist. The report predicted a continuing flood of asbestos claims:

> On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

Id. at 598. The Court also expressed deep concern over the manner in which asbestos claims are handled in the judicial system:

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Id. (quoting report of Judicial Conference Ad Hoc Committee on Asbestos Litigation). In *Ortiz*, the Supreme Court again noted these findings and referred, with evident alarm, to "the elephantine mass of asbestos cases." 527 U.S. at 821 & n.1. The Court stated that asbestos litigation "defies customary judicial administration and calls for national legislation." *Id.* at 821.

Hence, the Supreme Court's decisions disapproving the judicial class action settlements in these two cases rested not on any conclusion that case-by-case adjudication in the tort system was the required method for resolving asbestos claims, but rather on the legal determination that the judiciary lacked the authority, under current law, to adopt what was essentially a quasi-legislative solution to the problem. The Court noted the Ad Hoc Committee's recommendation that "[r]eal reform . . . required federal legislation creating a national asbestos dispute-resolution scheme." *Amchem*, 521 U.S. at 598; *see also id.* (noting recommendation of "passage by Congress of an administrative claims procedure similar to [that in] the Black Lung legislation") (internal quotation omitted). The *Amchem* Court acknowledged that "[t]he argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution." 521 U.S. at 628-29.

In the absence of legislation to the contrary, the Court had no choice but to rule that an unelected Article III federal district judge, bound by the Federal Rules of Civil Procedure, could not compel a putative "class" of millions of people exposed under disparate conditions to asbestos — a class far too heterogeneous to be capable of being meaningfully represented by the few parties who brought the case to court, and by their attorneys — to proceed through an administrative compensation scheme negotiated by those parties and the defendants and approved by the district court. The Supreme Court recognized that only Congress may "negotiate" any such solution. *See Amchem*, 521 U.S. at 599 ("In the face of legislative inaction, the federal courts . . . lack[] authority to replace state tort systems with a national toxic tort compensation regime").

The Court's plea for action on the part of Congress was repeated again this year.[1] And it's hard not to echo that call for national legislation. The landscape of asbestos litigation is not pretty. During the past 20 years, more than 500,000 asbestos cases have been filed, and some 2,100 asbestos cases have been tried or settled at a total cost of $54 billion. As the Wall Street Journal has observed, that is more money than the dollar cost of September 11, Enron, and WorldCom put together. Over half of that money has been consumed in transaction costs – chiefly for plaintiffs' and defendants' lawyers. According to a September 2002 study by the RAND Corporation, 65 percent of compensation over the last decade was paid to people claiming non-cancerous conditions.[2]

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[1] "The elephantine mass of asbestos cases lodged in state and federal courts, we again recognize, 'defies customary judicial administration and calls for national legislation.'" *Norfolk & Western Railway Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003) (citation omitted). Justice Stephen Breyer noted in his dissent, "Members of this Court have indicated that Congress should enact legislation to help resolve the asbestos problem. Congress has not responded." *Id.* at 1238.

[2] *See* Stephen J. Carroll *et al.*, RAND Institute for Civil Justice, Asbestos Litigation Costs and Compensation: An Interim Report (2002). This study was presented to the Committee previously in testimony by Dennis Archer, President-elect , American Bar Association, in Hearings on Asbestos Litigation, March 5, 2003.

In 2001 alone, nearly 90,000 individuals filed or joined in asbestos-related personal injury suits against 6,000 different entities. Yet only 10 percent of those claimants displayed any symptoms of asbestos-related illnesses. Many were forced by state statutes of limitations to file claims pre-emptively, before serious symptoms appeared. But the effect of such filings is to flood the asbestos litigation system and hinder the courts from providing timely compensation for people who have been gravely injured by asbestos diseases.

The process of compensation often resembles a lottery. Whether victims receive compensation and, if so, how much they receive depends on many factors having little to do with the strength of their claims or the severity of their injuries. The decisive factors are the fortuity of where and when the alleged victims file their lawsuits, whom they happen to sue, whether those defendants are solvent at the time the claims are filed and when, if ever, those claims have been translated into enforceable judgments. Some victims receive astronomical awards, while others receive little or nothing. Quite a few severely injured victims die before their cases can be heard.

The picture on the defendants' side is hardly better. One of the most marked changes in asbestos litigation is that the class of defendants is no longer limited to asbestos producers or companies, like shipbuilders, most heavily involved in its use. RAND found that the typical asbestos lawsuit now names 60 to 70 defendants, up from an average of 20 two decades ago. Since 1982 when 16,000 asbestos personal injury suits forced Johns Manville Corporation into Chapter 11 bankruptcy proceedings, asbestos litigation has driven more than sixty companies into bankruptcy. Twenty of those bankruptcies have been filed since 2001. Such filings benefit neither the companies nor asbestos victims. According to a study of a number of major asbestos defendant bankruptcies, an average of *six years* elapses between the initial filing of a bankruptcy petition and confirmation of a reorganization plan. During these proceedings, claimants are not paid. Moreover, bankrupt companies typically have limited resources to compensate victims. The Manville Trust, for example, can pay victims only five percent of the value of a claim.

The pace of asbestos litigation is not abating. Currently there are 8,400 defendants representing every major industrial sector in the country, and 60,000 to 100,000 new claims are filed every year. Thus, congressional inaction will carry serious consequences. That is why we must keep in mind that, although any bill with any realistic prospect of being enacted will entail some sacrifices that might not seem ideal, the long-run effects of *not* having a legislative solution (both the systemic effects and the concrete consequences for those in various positions in the virtually endless queue of asbestos claimants, present and potential) would be horrendous, both for the legal system as a whole and for its ability to vindicate the rights and meet the just claims of those who have been injured. Indeed, the prospect of doing nothing is so horrendous that one must say to those who find fault with this bill —– because they would prefer a legislative solution more generous to them and to others they see as similarly situated, or because they hold onto the hope, against mounting evidence to the contrary, that taking their chances with the current hodgepodge system of catch-as-catch can litigation would be preferable — that it is illusory, although understandably tempting, for them to imagine that they and their allies would fare better by digging in their heels in opposition, or by holding out for some unattainable ideal.

But of course I am here to address the constitutional rather than policy implications of the FAIR Act, so let me turn to those issues:

1. Legislative precedents for the FAIR Act.

Although the problems posed by asbestos are in many ways unique, the legal principles that support the FAIR Act are well established. Congress has frequently enacted statutes addressing particular liability issues in specific industries, including:

• The Bankruptcy Reform Act of 1994, Pub.L. 103-394, § 111(a), which previously responded to the asbestos litigation crisis by amending the Bankruptcy Code to enable a debtor in a Chapter 11 reorganization in certain circumstances to establish a trust toward which the debtor may channel future asbestos-related liability. 11 U.S.C. §§ 524(g), (h).

• The September 11 Victims Compensation Fund, codified at 49 U.S.C. § 10101 note, which was established as part of the Air Transportation Safety and Stabilization Act. Its goal is to provide compensation for economic and non-economic loss to individuals or relatives of deceased individuals who were killed or physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001. Once a claim is filed, the applicant is deemed to have waived the right to file a lawsuit to seek compensation for injury or death sustained as a result of the September 11 attacks. The applicant does not waive the right to seek compensation from collateral sources (such as life insurance) or to file a suit against alleged terrorists themselves. The fund is publicly subsidized, with pay-outs expected to reach four to five billion dollars for the families of the approximately 2,800 deceased victims of the attacks, along with the several hundred who were injured. The fund is administered by Special Master Kenneth Feinberg, who was appointed by the Attorney General.

• The Black Lung Disability Trust Fund , 30 U.S.C. § 901, et seq., which displaces state workers' compensation laws if they are found inadequate by the Secretary of Labor and provides more generous federal benefits. Under the black lung program, a claimant seeking benefits files a claim with the District Director in the Department of Labor's Office of Workers' Compensation Programs. The District Director investigates the claim and determines whether the claimant is eligible for benefits. If the claimant is eligible, the Director must then determine which employer should be held responsible for paying benefits to the claimant, either directly or through insurance. If no employer can be held responsible for the claimant's illness, the claimant is instead paid from the Fund, whose resources derive from an excise tax paid by coal mine operators based on the tonnage and price of coal sold. The scheme was upheld in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

• The Price Anderson Act, which caps damages in any single nuclear accident to $560 million, upheld in *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978).

• 42 U.S.C. § 2210(s), which limits the punitive damages liability of nuclear facilities licensees and contractors.

• The Federal Credit Union Act, 12 U.S.C. § 1787(c)(3)(A)-(B), which limits damages for lost profits, lost opportunity, or for pain and suffering stemming from the liquidation of federal credit unions.

• The National Swine Flu Immunization Program, Pub. L. No. 94-380, § 2, 90 Stat. 1113 (1976), which precludes private liability for adverse reactions to the Swine Flu vaccine that are not the result of manufacturer negligence or breach of contract and replaces such tort liability with a special remedy against the federal government.

• The National Vaccine Program, 42 U.S.C. §§ 300aa-1 to -33, which provides direct compensation to individuals who suffer injuries as the result of mandatory childhood vaccination and imposes limits on the assertion of claims against vaccine manufacturers.

• The Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, which provides a negligence-based federal cause of action for interstate railroad employees injured in the course of employment and preempts state common-law causes of action.

• The Jones Act, 46 U.S.C.App. § 688, which displaces state law and gives merchant seamen essentially the same benefits and limitations as FELA provides for interstate railway employees.

2. Congress' power to limit, modify, and extinguish causes of action.

The legislative precedents illustrate the breadth of Congress' power to adjust, restrict, or even abolish common-law and statutory causes of action. Thus, Congress has ample authority to rationalize asbestos claims, by creating an Article I procedure in the asbestos court for the orderly payment of such claims and thereby avoiding a race-to-the-bottom situation in which relatively unimpaired plaintiffs are overpaid, transaction costs are high, and grievously injured plaintiffs risk getting little or no compensation at all. Congress has the constitutional power to substitute this procedure for existing federal and state laws, even if the claim values under the FAIR Act are lower than the amounts awarded in the tort system (§ 131); even if payments under the FAIR Act are spread out over three years or made non-assignable, in contrast to state-law claims (§ 133(a)(1), (b)); even if the FAIR Act abrogates the collateral source rule followed by many states (§ 134); and even if the FAIR Act two-year statute of limitations is less generous than that in some states (§ 111(c)).

It has long been settled, ever since the states began adopting workers' compensation statutes, that a legislature is free to modify or abolish common-law causes of action without violating due process or creating a claim for compensation under the Takings Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982); *Martinez v. California*, 444 U.S. 277, 281-83 (1980). "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central Co. v. White*, 243 U.S. 188, 198 (1917) (collecting cases); *see also Branch v. United States*, 69 F.3d 1571, 1577-58 (Fed. Cir. 1995) ("[A] legislature is free to

make statutory changes in the common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property. The reason, the Supreme Court has explained, is that no one is considered to have a property interest in a rule of law."), *cert. denied*, 519 U.S. 810 (1996).

The Supreme Court has applied this principle to uphold statutory limits on liability. In *Duke Power*, the Court upheld the Price Anderson Act's $560 million cap on total compensatory damages recoverable under state-law causes of action from any single nuclear power plant accident, observing that "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978). The Supreme Court has explained that "our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby." *Id.* (citations omitted).

Judicial review of such matters is highly deferential. "[T]he judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that do not affect fundamental rights or proceed along suspect lines." *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976). As the Court made clear in *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980), in upholding Congress' decision to destroy statutorily scheduled retirement benefits for a class of railroad employees, the rational basis test is quite forgiving. Indeed, in *Fritz*, the Court attributed a "rational basis" to Congress even though the legislative history conclusively showed (and the district court expressly held, in never-repudiated factual findings) that Congress had had *no idea* that it was destroying the benefits in question. The highly complex bill was drafted by a coalition of railroad management and labor, without any input from the class of retirees in question. Yet it was simply irrelevant, according to the Supreme Court, that Congress might have been bamboozled. Nothing like that is occurring here, but it illustrates just how deferential any judicial review of the legislation will be.

3. Elimination of punitive damages.

To be sure, the FAIR Act does not provide for the recovery of punitive damages, but it is important to recall that private plaintiffs have no constitutionally cognizable entitlement to such damages. Punitive or exemplary damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Congress may reasonably decide to limit or eliminate punitive damages altogether for certain cases.

Indeed, in several areas of the law, and in some state legal systems, punitive damages are not available at all. The Supreme Court has, for example, held that punitive damages are not recoverable against municipalities under Section 1983, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), or under the labor laws against unions that breach their duty of fair representation. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). Congress has

eliminated punitive damages in several categories of cases involving nuclear power plants. 42 U.S.C. § 2210(s). Members of the Court have repeatedly urged deference to legislative measures that might be adopted either by Congress or by the states to regulate punitive damages. *E.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583-84 (1996); *id.* at 607 (Justice Ginsburg, joined by Chief Justice Rehnquist, dissenting); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Justice Scalia, concurring in the judgment); *id.* at 57 (Justice O'Connor, dissenting).

4. Equal protection objections by asbestos victims.

I understand that some have argued that it is unfair to impose a special Article I compensation scheme on asbestos victims while permitting other product liability and toxic tort plaintiffs to remain in the tort system. (In addition, some have contended that the various lines and classifications regarding defendants and insurers raise problems of unjustifiably disparate treatment. I address the issue of disparate impact on payors in the next section of my testimony.)

I do not believe that the proposed legislation offends norms of equality protected by the Fifth Amendment's Due Process Clause. It is entirely permissible for Congress to tailor its legislative response to a particular industry which raises special liability issues — as the asbestos industry palpably does. "A legislature may hit at an abuse which it has found, even though it has failed to strike at another." *United States v. Carolene Products Co.*, 304 U.S. 144, 151 (1938). "Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (citations omitted).

5. Equal protection objections by payors.

I have heard complaints that the classifications in the bill are unfair to certain payors. For example, some contend that the allocation formulas in the bill unduly burden particular companies and insurers while sparing others who are arguably at least as responsible. Indeed, even the decision to impose $45 billion in assessments on defendants and insurers might strike some as arbitrary; why should the two very disparate groups be required to pay precisely the same amount?

Further, the funding formulas might penalize responsible and conscientious defendants that have already satisfied all of their asbestos liabilities. The FAIR Act in effect forces such defendants to pay twice, while rewarding defendants that have thus far fortuitously escaped massive tort judgments or recalcitrant defendants that have refused to pay their fair share. Or consider a company whose asbestos liability has been masked by a latency period, only to be discovered next year or in the year 2020. That company benefits from the FAIR Act's approach because its asbestos liability will not be translated into financial payments to plaintiffs during the relevant time period made decisive by the Act. On the other hand, some defendants with previously known asbestos exposure may have already exhausted their insurance coverage (perhaps on the expectation that they have satisfied their liabilities) and will be particularly hard-hit by the assessments.

In short, it is easy to image scenarios where the application of the FAIR Act produces less-than-perfect justice. Whatever the merit of these complaints as a matter of policy, in my view none of them amounts to a valid constitutional objection.

(a) The deferential standard of the rational basis test.

The FAIR Act imposes its assessments on defendants according to two general parameters: past costs incurred for asbestos liability and current revenues. (§§ 201-02). For insurers, proportionate liability will be determined based on the following factors: net written premiums received from policies covering asbestos that were in force at any time during the period beginning January 1, 1940 and ending on December 31, 1986; net paid losses for asbestos injuries compared to all such losses for the insurance industry; and net carried reserve level for asbestos claims on the most recent financial statement of the insurer participant.

These factors are reasonably related to Congress' purposes in adopting the FAIR Act. They are not perfect, but they are "good enough for government work." To be sure, it is possible to imagine other proxies, but the Supreme Court has repeatedly held that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted).

These restraints on judicial review have particular force "where the legislature must necessarily engage in a process of line-drawing." *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. at 179. Developing classifications among defendants and insurers "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id. See also Beach Communications*, 508 U.S. at 316 ("Congress had to draw the line somewhere . . . . This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.").

Further, if a socioeconomic measure is generally rational, the fact that its rationale fails to fit or to explain a particular application of the measure is not a basis for finding an equal protection violation. *See Beach Communications*, 508 U.S. at 316; *see also New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979) (upholding city transit authority's refusal to employ any user of narcotic drugs – even successful methadone users who were recovering heroin addicts – because "[e]ven if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this

'perfection is by no means required'") (citations omitted); *Cleland v. National College of Business*, 435 U.S. 213, 221 (1978) (*per curiam*) ("If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'") (citation omitted); *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.").[3]

(b) Previous assessments upheld by the Supreme Court.

The Supreme Court has repeatedly upheld exactions imposed by Congress against similar objections. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), for example, the Court emphatically rejected a constitutional attack on the Black Lung statute by certain coal mine operators who argued that the Act violated the Fifth Amendment Due Process Clause by requiring them to compensate former employees who had terminated their work in the industry before the Act was passed. The operators accepted the constitutionality of the liability imposed upon them to compensate employees working in coal mines now and in the future who may be disabled by black lung, and they recognized Congress' general power to create a program for compensation of disabled inactive coal miners. But the operators complained that imposing liability upon them for their former employees' disabilities would impermissibly charge them with an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time. In particular, the operators maintained that the Act spread costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than by taxing all coal mine operators presently in business. The operators noted that a coal mine operator whose work force had declined might be faced with a total liability that was demonstrably disproportionate to the number of miners currently employed. And they argued that the liability scheme gave an unfair competitive advantage and even a free ride to new entrants into the industry, who would not be saddled with the burden of compensation for inactive miners' disabilities.

The Supreme Court assumed all of this to be true, yet nonetheless upheld the Black Lung statute. The Court held that "it is for Congress to choose between imposing the burden of inactive miners' disabilities on *all* operators, including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely on those *early* operators whose profits may have been increased at the expense of their employees' health."

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[3] The principle is so well established that the Court's one and only departure from it, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (refusing to apply heightened scrutiny to a law requiring homes for the mentally retarded to apply for a special use permit, upholding the law as rational, but more carefully scrutinizing its application to the particular home at issue in the case before the Court and concluding that, as applied to that home, the denial of a permit was the product of irrational prejudice and could not stand), has become something of a landmark precisely because of its remarkable departure from the otherwise settled practice to the contrary. *But see Board of Trustees v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (discussing *Cleburne*).

Id. at 18 (emphasis added). The Court explained that laws "adjusting the burdens and benefits of economic life" come to the judiciary with a heavy presumption in favor of their constitutionality and will be sustained unless they are palpably irrational. *Id*. at 16. Exactly the same analysis governs the FAIR Act.

Similarly, in *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the Supreme Court upheld the Multiemployer Pension Plan Amendments Act against a constitutional claim that the Act assigned certain employers more than their proportionate share of liability under multiemployer pension plans. The Court explained that "[i]t is true that, depending on the future employment of Concrete Pipe's former employees, the withdrawal liability assessed against Concrete Pipe may amount to more (or less) than the share of the Plan's liability strictly attributable to employment of covered workers at Concrete Pipe." *Id*. at 638. "But this argument simply ignores the nature of multiemployer plans, which, . . . operate by pooling contributions and liabilities." *Id.* at 637-38. The Court held that imperfect allocations of liability could not render the statute irrational.

Such a deferential judicial view, in my opinion, means that this aspect of the proposed legislation should – and almost certainly would – be upheld. Nor is this an area in which the reasons for judicial deference are exclusively institutional so that Congress might properly impose upon itself more stringent constitutional constraints than would be imposed by the Court. Rather, the reasons for judicial deference here go to the fundamental truths that it is folly to make the perfect the enemy of the good and that pragmatism must sometimes temper idealism if we are to avoid truly disastrous outcomes. Congress does not abandon its constitutional responsibilities but fulfills them when it heeds the dictates of such practical wisdom.

6. As-applied due process, takings, and retroactivity challenges by certain payors.

I have also heard the argument that individual payors disadvantaged by the allocation procedures established in the bill might bring as-applied challenges. That is, a particular defendant or insurer who believed that its assessment was disproportionate to its past responsibilities or to its reasonable expectation of future liabilities might challenge a specific assessment by the Asbestos Injury Claims Resolution Fund or the Asbestos Insurers Commission. The Supreme Court encountered such an as-applied challenge in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where it held the Coal Industry Retiree Health Benefit Act of 1992 unconstitutional as applied. But *Eastern Enterprises* makes clear that such as-applied challenges are case- and fact-specific and do not disrupt the operation of a statute as a whole.

The Coal Act required the Commissioner of Social Security to assign each coal industry retiree eligible for benefits to an extant coal operating company or a "related" entity, which was then responsible for funding the assigned miner's benefits under the United Mine Workers of America Combined Benefit Fund. In *Eastern Enterprises*, the Supreme Court held that the Coal Act could not be validly applied to require a company to pay health care benefits to over 1,000 of its former employees. Although there was no single opinion for the Court, Justice O'Connor, writing for a plurality that included Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, distilled three

factors of "particular significance" in determining whether governmental action was permissible: "the economic impact of the regulation, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action." *Id.* at 523-24 (internal quotation omitted). The plurality concluded that the Takings Clause of the Fifth Amendment forbids a retroactive governmental assessment in a particular case if it "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and [if] the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29 (internal quotation omitted). Justice Kennedy, concurring in the judgment and dissenting in part, agreed that the Coal Act as applied to Eastern Enterprises was arbitrary and therefore unconstitutional. He rested his decision on the Due Process Clause of the Fifth Amendment rather than on the Takings Clause.

It appears to me that the funding formulae set forth in the FAIR Act will satisfy the three *Eastern Enterprises* factors in the vast majority of (if not all) cases. The formulae do not impose unfair retroactive liability based on past events. Rather, they use past histories of payments for asbestos-related judgments to predict future liabilities. The system, like all such systems, is not perfect. But it is rational and reasonably tailored to the companies' expectations. The aim is to apportion liability according to responsibility, not (as in *Eastern Enterprises*) to saddle one company with liability because it is the last remaining solvent defendant. Indeed, the aim of the legislation is precisely to *avoid* such a scenario, which is currently being played out in the tort system.

Further, under the FAIR Act limited adjustments are available to individual companies based on financial hardship or demonstrated unfairness (§§ 204(d)(2), 204(d)(3)). Although these adjustments are capped in the aggregate (3% of total annual contributions in the case of the financial hardship exception, 2% in the case of the inequity exception), they can provide important relief in individual cases, and an aggregate cap would likely be upheld under reasoning akin to that in *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (upholding state regulation placing an absolute welfare limit of $250 monthly per family, regardless of the family's size or actual need). The adjustments would certainly foreclose a facial attack on the statute and would force potential objectors to pursue separate, and plainly uphill, as-applied challenges.

7. Nondelegation challenges by payors.

I have also heard the objection that the FAIR Act grants an impermissible delegation of authority to the Administrator in allocating defendant participant contributions and similarly grants an improper delegation to the Asbestos Insurance Commission in deciding the amount of insurer contributions. I do not believe these objections carry much constitutional weight.

The Supreme Court has not invalidated a single delegation of congressional power on nondelegation doctrine grounds since 1936. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Since then, the Court has followed a highly deferential approach to congressional delegations of authority, making clear that a delegation is permissible so long as Congress has established "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

The standard of an "intelligible principle" to guide the agency is not unduly demanding. Thus, in *Whitman v. American Trucking Assns.*, 531 U.S. 457 (2001), the Court upheld a provision of the Clean Air Act directing EPA to set air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety." In *Touby v. United States*, 500 U.S. 160 (1991), the Court upheld a statute permitting the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was "necessary to avoid an imminent hazard to the public safety." *Id*. at 163. The Court has approved the Occupational Safety and Health Act provision requiring the agency to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health." *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980). The Court has upheld the authority of the SEC to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicated" and do not "unfairly or inequitably distribute voting power among security holders." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). And the Court has found an "intelligible principle" in various statutes authorizing regulation in the "public interest." *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (FCC power to regulate airwaves); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (ICC power to approve railroad consolidations). In short, the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting); *see id.* at 373 (majority opinion).

Given the current state of constitutional doctrine, I believe the bill contains a sufficiently intelligible standard by which the Administrator can decide each defendant's contribution amount. Defendants are placed in different tiers according to administrable factors: their respective amounts of prior asbestos expenditures. (§ 202). Contribution assessments are calculated according to percentages of revenue set out in the bill. (§ 203). Statutory minimum contributions are also specified. (§ 204). Similarly, the Insurance Commission is given what I believe is constitutionally adequate direction in allocating contributions among insurer participants based on the proportionate liability of each. Section 212 enacts the factors that the Commission is to consider.

If there were any doubt on the matter – including the standards by which assessments are to be imposed under Section 225 on additional contributing participants (companies whose liability and defense costs are less than $1 million and are likely to avoid future civil liability as a result of the FAIR Act) – the bill could be quite readily clarified by supplementing the list of allocation and assessment criteria.

8. Federalism and the Tenth Amendment.

I understand that some have questioned whether the FAIR Act is consistent with states' rights and principles of federalism. It is important to note that the proposed legislation would simply displace state law substantively and replace it with a special Article I scheme containing an exclusively *federal* statutory cause of action. It would not conscript or commandeer state agencies

or state courts into the service of the federal government. The FAIR Act therefore does not run afoul of the Tenth Amendment and related principles of federalism.

These principles prohibit the federal government from compelling the states to enact or administer a federal regulatory program, as in *Printz v. United States*, 521 U.S. 898 (1997), and they bar federal efforts to "commandeer" state governments in the service of federal regulatory programs. *New York v. United States*, 505 U.S. 144, 175 (1992). However, these principles do not prevent Congress from fully pre-empting state law so long as Congress acts within a substantive sphere of federal power. *New York v. United States*, 505 U.S. at 160, 167, 168, 174, 178, 188. *See also Reno v. Condon*, 528 U.S. 141 (2000) (upholding Driver's Privacy Protection Act even though it was not in practice a generally applicable law and regulated only records generated by the states themselves).

Federal pre-emption of state law is, of course, entirely familiar under the Supremacy Clause of Article VI, § 2. Ever since *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that state law which conflicts with federal law is automatically "without effect." Accordingly, the pre-emption effected by the FAIR Act is not a matter of constitutional concern.

9. The Commerce Power.

(a) The several ways in which Congress' commerce power is triggered here.

The FAIR Act fits comfortably within Congress' commerce power. The sale of asbestos, which was processed and used in thousands of construction and consumer products, clearly occurred in interstate commerce. The health harms of asbestos are direct effects of that commerce. Just as Congress may regulate the hazardous waste dumps which are the byproducts of interstate commerce (some of which occurred decades ago), Congress may also regulate the lingering effects of asbestos commerce, even if it occurred many years ago. In addition, asbestos litigation as an activity in itself is a uniquely interstate phenomenon, with lawyers, medical consultants, and expert witnesses almost invariably crossing state boundaries in order to conduct the proceedings.

Moreover, the economic *effects* of asbestos litigation on interstate commerce are indisputably significant. The asbestos claims system wreaks economic havoc on companies, workers, and retirees throughout the nation.[4] Congress has a particularly compelling reason to act, for asbestos litigation has a massive impact on the entire federal court system. As I have already noted, the total cost of

[4] Much of this information has already been presented to the Committee in hearings on asbestos litigation (including hearings on March 5, 2003). It was also the subject of hearings on the State of the Economy before the Senate Budget Committee on January 29, 2003. *See also* Joseph E. Stiglitz *et al.*, The Impact of Asbestos Liabilities on Workers in Bankrupt Firms (American Insurance Assocation, 2002); *Asbestos Suits Affect Worker Wages, 401(k) Values: Study*, National Underwriter, Dec. 9, 2002; *Findley v. Trs. of the Manville Pers. Injury Settlement Trust (In re Joint E. & S. Dists. Asbestos Litig.)*, 237 F. Supp. 2d 297, 305 (E.D.N.Y. 2002).

asbestos litigation is already $54 billion. It has contributed to more than sixty business bankruptcies. A recent report sponsored by the American Insurance Alliance and prepared by Nobel Prize laureate Joseph Stiglitz, professor of economics at Columbia University, Jonathan Orszag, managing director of Sebago Associates, and Peter Orszag, the Joseph A. Pechman Senior Fellow in Economic Studies at the Brookings Institution, estimated that asbestos-related bankruptcies have cost as many as 60,000 jobs. On average, the report stated, these workers lost between $25,000 and $50,000 in wages, and the average worker at an asbestos-related bankrupt firm with a 401(k) plan suffered roughly a 25 percent reduction in the value of the retirement account.

A U.S. Chamber of Commerce-sponsored study by National Economic Research Associates, released in January 2003, found that there will be as much as $2 billion nationwide in additional costs borne by workers, communities and taxpayers due to indirect and induced impacts of company closings related to asbestos. Even non-bankrupt companies suffer. Many firms, in order to avoid bankruptcy and to compensate the most deserving victims, have attempted to set aside sufficient resources to compensate the victims who have manifest injuries from exposure to asbestos, reducing capital expenditures to that degree. According to the RAND Corporation, if current trends continue, another $150 billion to $200 billion will be spent on asbestos litigation, resulting in the loss of an estimated 423,000 U.S. jobs.

The FAIR Act thus has ample constitutional basis under the Commerce Power. To make the matter crystal clear, some of these interstate effects could be addressed at length in the appropriate Committee Report, or even included as findings in the text of the statute itself.

(b) The FAIR Act is a valid exercise of the commerce power, even as interpreted in *Lopez*.

Readily distinguishable is *United States v. Lopez*, 514 U.S. 549 (1995), which became the first Supreme Court ruling since 1937 finding a congressional enactment to have gone beyond the bounds of the commerce power when it held that the Gun-Free School Zones Act exceeded Congress' power under the Commerce Clause. *Lopez* rested on the Court's assessment that the regulated activity – there, any instance of firearms possession near a school – did not substantially affect interstate commerce. *Lopez* is best understood as focusing on the nature of the underlying activity – whether that activity could be described as part of or intrinsically related to a commercial transaction or economic enterprise. Mere possession of a handgun has no manifest connection to interstate commerce. The phenomenon of gun possession near schools can, of course, be linked to ultimate effects on the nation's economy – but only through a causal chain so long and so greatly attenuated that, if it were deemed to suffice, then the power of Congress under the Commerce Clause would be truly plenary. By contrast, in *Lopez* the Court reaffirmed its decisions upholding federal laws regulating such intrastate activities as coal mining, loan sharking, running a restaurant or a hotel, and producing wheat for home consumption.

In the instance of this legislation, the use of asbestos in shipbuilding, pipelaying, and other industrial activities is clearly part of indisputably commercial activity subject to federal regulation, just as are the subjects reached by OSHA rules, federal mine safety regulations, and EPA rules. And

the palpable effects of asbestos litigation on interstate commerce make this situation completely unlike that in *Lopez*.

Cases subsequent to *Lopez* do not suggest that it would pose a problem for the FAIR Act. *E.g., Pierce County v. Guillen*, 537 U.S. 129 (2003) (statutory privilege for data collected as part of federal highway program fell within commerce power because it was aimed at improving safety in the channels of interstate commerce).

In a unanimous *per curiam* opinion issued on June 2, 2003, in *Citizens Bank v. Alafabco*, No. 02-1295, the Court held that application of the Federal Arbitration Act (which extends only to "contract[s] evidencing a transaction involving commerce") was not defeated simply because some of the debt-restructuring transactions at issue in the case did not have a "substantial effect on interstate commerce." The Court opined that "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.' Only that general practice need bear on interstate commerce in a substantial way." Slip op. at 5 (citations omitted). The Court explained that *Lopez* did not "purport to announce a new rule governing Congress' Commerce Clause power over concededly economic activity such as the debt-restructuring agreements before us now." *Id.* at 6-7.[5]

10. Impairment of contracts.

Some have raised questions regarding the impact of the FAIR Act on private contracts. For example, defendants and their insurers have contracts apportioning financial responsibility for asbestos liability. Plaintiffs and their attorneys have agreements as to fees. These and other private arrangements will upset by the FAIR Act. Does Congress have the authority to disrupt such expectations? The short answer is that the Impairment of Contracts Clause does not apply to Congress and, in any event, its principles would not prove fatal to the FAIR Act.

(a) The Impairment of Contracts Clause does not apply to federal legislation.

The Impairment of Contracts Clause of Article I, § 10 applies only to state legislative acts, not to Congress. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732-33 (1984). "It could not justifiably be claimed that the Contracts Clause applies, either by its own terms

[5] *Cf. Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (Clean Water Act provision requiring permit from Army Corps of Engineers for discharge of fill material into navigable waters did not extend to isolated, abandoned sand and gravel pit with seasonal ponds which provided migratory bird habitat); *Jones v. United States*, 529 U.S. 848 (2000) (federal arson statute did not cover the arson of an owner-occupied dwelling not used for any commercial purpose); *United States v. Brzonkala*, 529 U.S. 598 (2000) (Violence Against Women Act beyond commerce power because it did not regulate economic activity or interstate commerce).

or by convincing historical evidence, to actions of the National Government. Indeed, records from the debates at the Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause." *Id.* at 733 n.9.[6]

Further, the Supreme Court has "never held . . . that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts. Indeed, to the extent that recent decisions of the Court have addressed the issue, [the Court has] contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses." *Id.* at 733. Hence the long-settled rule is that "[c]ontracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-08 (1935). "If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." *Connolly v. Pension Ben. Guaranty Corp*., 475 U.S. 211, 224 (1986). *See also Horowitz v. United States*, 267 U.S. 458, 460 (1925) (government's sovereign acts do not give rise to a claim for breach of contract).

(b) The Clause would not invalidate the FAIR Act in any event.

In any event, violating the literal command of the Contracts Clause is far from automatically fatal even for state legislation. In *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), the Supreme Court made clear that, although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of each state "to safeguard the vital interests of its people." *Id*. at 434. Thus, a state prohibition law may be applied to contracts for the sale of beer that were valid when entered into, *Beer Co. v. Massachusetts*, 97 U.S. 25 (1878); a law barring lotteries may be applied to lottery tickets that were valid when issued, *Stone v. Mississippi*, 101 U.S. 814 (1880); and a workmen's compensation law may be applied to employers and employees operating under pre-existing contracts of employment that made no provision for work-related injuries, *New York Central R. Co. v. White*, 243 U.S. 188 (1917).

As the Supreme Court has explained, the Contracts Clause must be interpreted against the background assumption that a state may make reasonable exercise of its police powers: "the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already

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[6] The fact that the Contracts Clause binds the states but not Congress is one reason the Court has long held that Congress, but not any of the states, is empowered to enact bankruptcy laws. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (Marshall, C.J.).

in effect.' Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Blaisdell*, 290 U.S. at 434-35 (citation omitted). The Court has indeed held that even a substantial impairment of contract is presumptively valid where the state itself does not have a direct interest (pecuniary or otherwise) in the subject of the regulation, *see United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977), and where the state has "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy Resources Group v. Kansas Power & Light*, 459 U.S. 400, 411 (1983). "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' Unless the State itself is a contracting party, '[as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Id.* at 412-13 (citations omitted and brackets in the original). *See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 190 (1983).

Congress may, of course, empower federal officers or agencies, such as the Administrator of the Fund, to enter into binding agreements on behalf of the United States that safeguard contracting parties, such as companies that enter into contracts with the U.S. Government for valid consideration, from the financial impact of legal changes wrought by Congress so long as that power to bind the United States is unmistakably conferred and unambiguously exercised. But the FAIR Act would not abrogate existing federal contracts to which the government is a party, and so the principle of *United States v. Winstar Corp.*, 518 U.S. 839 (1996), may be left to one side.

11. Termination of pending cases and the separation of powers.

The FAIR Act would require the dismissal of any case that is still pending, even where a trial judgment is on appeal. But the operation of the Act in this respect poses no constitutional difficulty. For it is settled that Congress may change applicable law in a way that terminates or settles pending civil actions. *See, e.g., Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992) (drawing distinction between terminating pending cases, even by name and docket number, by formulating a change (however peculiarly aimed at the specific cases in question) in the applicable rule of law – which is deemed not to interfere with or usurp the judicial function – and aiming at a designated closed class of pending cases as such and simply commanding that they be terminated – which is deemed a usurpation). Not until a lawsuit proceeds to final judgment does a vested property right attach that cannot be upset through congressional action. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 431 (1856).

Thus, Congress has the power "retroactively" to abrogate common-law causes of action, so long as it leaves final judgments intact. The cases terminated by the FAIR Act are in no sense analogous to a list of specific cases but constitute an understandable general category (as in "pending" cases dealing with asbestos), legislation with respect to which clearly entails promulgation of a change in the underlying applicable rule of law. Indeed, the class of cases

terminated by the FAIR Act is not a closed set, because future cases asserting the same causes of action are prohibited, and that part of the affected class is manifestly open rather than closed.

12. Abrogations of bankruptcy reorganization plans.

The FAIR Act interacts with the Bankruptcy Code in several ways, none of which is constitutionally problematic in my view. For example, companies with prior asbestos expenditures that have a case pending under a chapter of the Bankruptcy Code prior to a date specified in the Act are automatically assigned to tier I (for purposes of calculating assessments) if the bankruptcy filing was caused by asbestos liability. (§ 202(c)).[7] The FAIR Act supersedes any plan of reorganization of any debtor assigned to tier I and any related agreement or understanding with respect to the treatment of any asbestos claim. (§ 202(f)). No person will have any rights or claims regarding any such plan or agreement. (*Id.*). In addition, the FAIR Act authorizes $4-6 billion in assessments on trusts established to compensate asbestos claims, including trusts established under Section 524(g) of the Bankruptcy Code. (§ 402l).

Some have questioned whether Congress has the authority to supersede these plans of reorganization and, in effect, appropriate funds out of confirmed bankruptcies and into the congressionally created fund. The answer is plainly in the affirmative. For the bankruptcy process, and in particular the confirmation of a plan of reorganization, does not provide a debtor with ongoing immunity from federal law. After confirmation, the operations of the debtor are fully subject to congressional and other forms of federal regulation. The Bankruptcy Code does not give the debtor "carte blanche to ignore nonbankruptcy law." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 502 (1986). *See NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 534 (1984)(debtor not relieved of labor law obligations merely by petitioning for bankruptcy); *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1353-55 (9th Cir. 1994) (reorganization plan does not immunize debtor from state law on ongoing basis).

The Supreme Court applied this principle in *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141 (1944), involving a provision of the 1938 Chandler Act that required the reduction of the

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[7] Any company that filed for Chapter 11 protection prior to January 1, 2003, and "has not confirmed a plan of reorganization as of the date of enactment of this Act . . . and the Chief Executive Officer, Chief Financial Officer, or Chief Legal Officer" of which "certifies in writing to the bankruptcy court presiding over the [company's] case, that asbestos liability was neither the sole nor precipitating cause for the [company's] filing under chapter 11," "may proceed with the filing, solicitation, and confirmation of a plan of reorganization" notwithstanding other provisions of the FAIR Act if the presiding bankruptcy court finds the plan's "confirmation . . . necessary to permit the [company's] reorganization . . . and assure that all creditors and that [company] are treated fairly and equitably; and . . . confirmation is clearly favored by the balance of the equities" so long as the confirmation order is entered within nine months "after the date of enactment of this Act or such longer period of time approved by the bankruptcy court for cause shown."

basis of property transferred in the acquisition of an insolvent corporation to the fair market value of the property at the date of confirmation of a reorganization plan. Observing that "the whole problem . . . was to give the Chandler Act as wide room as possible for future operation, notwithstanding the previous vesting of substantive rights or institution of bankruptcy or reorganization proceedings,"323 U.S. at 157-58, the Court had little difficulty in concluding that the changes in the tax laws applied even to reorganization "plans already confirmed in pending proceedings." *Id*. at 158. *See also Dickinson Industrial Site, Inc. v. Cowan*, 309 U.S. 382 (1940) (application of new procedural rules to a bankruptcy proceeding that was pending when the new statute was enacted); *Carpenter v. Wabash Railway*, 309 U.S. 23 (1940) (provision giving personal injury judgments the status of operating expenses and thus priority over mortgages in ongoing railroad reorganizations); *McFaddin v. Evans-Snider-Buel Co.*, 185 U.S. 505 (1902) (curative statute providing the methods by which valid mortgages could be created in the Indian Territory); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870) (payment of debts in legal tender).[8]

13. Article III and the Asbestos Court.

Some have attempted to argue that Congress may not take tort claims out of the judicial system and assign them to Article I courts for resolution, even where (as here) Congress provides for subsequent judicial review in the Article III courts. However, the law has been to the contrary ever since *Crowell v. Benson*, 285 U.S. 22 (1932) (holding that Congress may replace a seaman's traditional negligence action in admiralty with a statutory scheme of strict liability in which an administrative official's award of compensation could be enforced or set aside by federal district court). The Court has underscored "the importance of [its] time-honored reading of the Constitution as giving Congress wide discretion to assign the task of adjudication in cases arising under federal law to federal tribunals." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 889 (1991).

It is important to clarify that the FAIR Act does not simply *transplant* existing state and federal causes of action to the new asbestos court. Rather, it creates new administrative remedies for a new kind of federal claim and establishes a federal government fund from which compensation may be provided. Those new claims involve paradigmatic examples of "public rights" cases, which *Crowell* defined as those "aris[ing] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." 285 U.S. at 50; *see also Thomas v. Union Carbide Agric. Prods*., 473 U.S. 568, 593-94 (1985) ("public rights" are rights against the government or closely intertwined with a regulatory scheme); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) ("The crucial question, in cases not involving the Federal Government, is whether Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly

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[8] *Railway Labor Executives Assn. v. Gibbons*, 455 U.S. 457 (1982) (striking down federal railroad reorganization statute under uniformity test because it could not be said to apply uniformly even to major railroads in bankruptcy proceedings throughout the United States), is inapposite here. The FAIR Act is justified under the Commerce Clause, not simply the Bankruptcy Clause, and in any event it applies uniformly to a defined class of debtors.

'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.") (internal quotation omitted). All claims against the Asbestos Injury Claims Resolution Fund by persons injured by asbestos, and all disputes involving assessments on defendants and insurers, fall within this definition of "public rights."

The Supreme Court has long confirmed the power of Article I courts and administrative agencies to resolve claims involving "public rights" such as those involving the Asbestos Injury Claims Resolution Fund. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (Congress "may or may not bring within the cognizance of the courts of the United States, as it may deem proper," matters involving public rights). Thus, in *Thomas* the Court upheld a provision of the Federal Insecticide, Fungicide, and Rodenticide Act that required private parties under certain circumstances to arbitrate disputes arising under the statute, with Article III judicial review of the arbitrator's decision only for "fraud, misrepresentation, or other misconduct." The Court opined that "Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts." 473 U.S. at 583. In *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), the Court upheld a statute empowering the CFTC to entertain state-law counterclaims by a broker when a customer brought an administrative action against the broker. *See also Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943) (permitting initial adjudication of state law claim by a federal agency, subject to judicial review, when that claim was ancillary to a federal law dispute).

And in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), in the course of holding that parties who had failed to file claims against a bankrupt's estate were entitled to a jury trial when they were sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer, the Court reaffirmed Congress' power to assign matters of "public rights" to administrative agencies for resolution. *See, e.g., id.* at 55 n.10 (affirming congressional power to bar jury trial over claims "involving statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity").

14. The right to jury trial.

Relatedly, some have questioned whether the FAIR Act is consistent with the Seventh Amendment, insofar as the Act would create an Article I court in which claims are resolved without jury trial. My conclusion is that this procedure is constitutional. Whatever limits the Seventh Amendment might impose on a scheme that left asbestos claims in Article III courts and sought simply to withdraw the right to jury trial, Congress under the FAIR Act would be proceeding differently: the Act would abolish the cause of action in the Article III federal courts altogether, leaving nothing for a jury to hear. In place of a common-law claim, the bill would create a new statutory action before the Article I asbestos court.

In *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455 (1977), the Supreme Court held that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible,

without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" The Court continued, in language directly apposite to the asbestos context, that "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency." *Id.*

Thus, "Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right," *Granfinanciera*, 492 U.S. at 53, if that statutory cause of action involves a matter of "public right" – that is, if it inheres in, or lies against, the federal government in its sovereign capacity, as is the case with claims in the asbestos court. In other words, "if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Id.* at 53-54.

By way of example, Congress historically has fashioned causes of action – even causes of action closely analogous to common-law claims – and placed them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable. *See, e. g., Atlas Roofing*, 430 U.S. at 450-461 (workplace safety regulations); *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974) ("[T]he Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication. . . . [T]he Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency."); *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (temporary emergency regulation of rental real estate).

15. Procedural due process.

I understand that two arguments regarding procedural due process have also been raised: first, that it is somehow unfair to modify or extinguish existing asbestos claims without the consent or participation of the victims themselves; and second, that the procedures in the new asbestos court are constitutionally inadequate. Neither objection has merit.

(a) Procedural due process regarding adoption of the FAIR Act.

Due process does not require Congress to provide individualized notice and opportunities to be heard before enacting legislation. In the national legislature, all citizens are represented on a basis of one person, one vote, *see Reynolds v. Sims*, 377 U.S. 533 (1964), and the interests of even future Americans are affected every day by decisions that Congress makes regarding the national debt, federal borrowing, and myriad fiscal priorities. Conflicts of interest among different groups in the legislative process are hardly unique to this legislation and could not provide a basis for attacking statutes without rendering Congress and all fifty state legislatures all but impotent. "General statutes within the [government's] power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights

are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

(b) Procedural due process regarding the operation of the asbestos court.

The procedures in the asbestos court plainly satisfy due process, the familiar elements of which are notice, an opportunity to be heard, and a fair hearing before an impartial decisionmaker. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993); *see also Mullins Coal Co. v. Director, Office of Workers Compensation Programs*, 484 U.S. 135, 155-58 (1987) (upholding regulations for the processing of claims for black lung disease).

The composition of the court is unobjectionable. The FAIR Act creates an Article I "United States Court of Asbestos Claims." There are five judges appointed by the President and confirmed by the Senate for 15 years (§ 101(a), creating 28 U.S.C. § 201(a)(1))[9] who may be removed by the President for "good cause" (§ 101(a), creating 28 U.S.C. § 201(b)(2)), who appoint magistrates (§ 202(a)), who in turn use claims examiners (§ 114(a)). The judges make the final decisions based on magistrate recommendations. There is en banc review (§ 141(a)(1)(B)), arbitrary and capricious review in the DC Circuit (§ 301(b)(3)(A)), and then Supreme Court review by way of certiorari (§ 301(b)(4)).

The asbestos court will award compensation on a no-fault basis according to objective medical criteria, without requiring the claimant to prove product defect. The requirements for filing claims are set out clearly in the statute. The medical and exposure criteria are borrowed in part from the Manville Trust Distribution Process. The court is authorized to promulgate rules and rebuttable presumptions to govern the elements of claims. In addition, the bill authorizes the asbestos court to establish a legal assistance program to aid claimants. The court is to maintain a list of attorneys who are willing to provide their services on a pro bono basis.

Finally, the FAIR Act provides constitutionally adequate guidelines for the timely processing of claims in the first instance. Claims must be referred to magistrates within 20 days. Claims examiners must notify claimants if additional information is needed to determine eligibility, such as a medical exam. Once a claims examiner has all the necessary information, the claim and a recommendation are sent to a magistrate who has 60 days after receipt of a completed claim to provide a written recommendation, including the requisite findings of fact. No later than 30 days after the magistrate makes these recommendations, a judge of the asbestos court is to make a final decision of the award to which the claimant is entitled. The court is to establish expedited procedures for exigent cases.

These procedures certainly satisfy due process.

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[9] This appointment process is the same as that used by the United States Court of Federal Claims, which is also an Article I court. 28 U.S.C. § 171(a).

16. Suggestions for possible consideration by the Committee.

In the course of my review of the FAIR Act, I have noted several issues that, although they do not raise constitutional questions and therefore are not addressed by the analysis offered thus far, may bear consideration.

Section 134(a): Payments are "reduced by the amount of collateral source compensation that the claimant received, or is entitled to receive, for the asbestos-related injury that is the subject of the compensation." Arguably, however, an action by the claimant to secure this collateral source compensation is preempted under Section 403(d)(2); an exception to the preemption provision is arguably warranted.

Section 141(c): The Act appears to contemplate the presence of counsel on behalf of the Fund or Administrator only in en banc proceedings. It seems entirely possible, however, that such counsel might be warranted before the examiner, a magistrate, or a single judge, particularly early in the Act's implementation as practices and procedures are developed. Consideration should be given to substituting "before a panel" with "under the Act."

The availability of en banc review as a matter of right potentially invites a substantial administrative burden on the court. Consider making en banc review discretionary or imposing some reduction in the award for failed en banc appeals.

Section 202(f): The Act broadly preempts *entirely* any plan of reorganization of a defendant company, but does not provide substitute provisions relating to aspects of the bankruptcy unrelated to the payment of asbestos claims. Some clarification may be in order here.

Sections 204(i): The Act provides little incentive for participants to provide timely information. Consideration should be given to including penalties, especially for willful violations.

Section 204(i)(8): The Act confers an automatic right of rehearing for assessments. As with Section 141(c), *supra*, this right makes the process painless. Consider adding a provision that permits the Administrator to impose a penalty for a frivolous rehearing request.

Section 212(b)(3)(B): The Act requires the Commission to make an initial determination regarding the contribution obligations of insurers within 120 days of its first meeting. This is just one of a number of provisions that seems a bit optimistic regarding the ability of administrative and judicial officers to complete their assigned responsibilities expeditiously. That is a particular concern with respect to contribution obligations because, once the Act is passed, contributors will be submitting an extraordinary deluge of complex financial information.

Section 216: The Commission terminates 60 days after submitting the required report to Congress under Section 212(d), not Section 212(c).

Section 212(a)(4): The Administrator is deemed a fiduciary of the Fund. In light of the

litigation over Native American trust funds, consideration should be given to whether to create specific provisions governing any judicial challenge to the administration of the asbestos Fund.

Section 212(e): The Orphan Share Reserve Account includes funds above the annual maximum contributions. Consideration should be given to the fact that such annual excess contributions may portend annual shortfalls in later years.

Section 302(b)(2): The D.C. Circuit may overturn a contribution determination as arbitrary and capricious. A ruling with respect to a single contributor could have wide implications for entire classes of contributors, however. Consideration should be given to permitting the Administrator or Commission to adjust all contributions so affected in the event of such a ruling.

Section 303(b): There is a direct right of appeal to the U.S. Supreme Court of any decision holding the Act unconstitutional in whole or in part. Consideration should be given to a provision mandating that any challenge to the constitutionality of the Act be brought in, or transferred to, the D.C. District Court, which should endeavor to consolidate the challenges.

Section 304: Insurers are permitted to sue reinsurers in the D.C. District Court. Consideration should be given to clarifying what law applies and whether this provision is intended to preempt arbitration agreements.

Section 403(b): The Act supersedes other agreements previously made by defendants. Consideration should be given to clarifying that this provision is subject to subsection 403(d)(1), which permits the enforcement of prior court judgments.

Section 403(d): The Act appears to intend that the D.C. District Court will stay or transfer action on any asbestos claim. This provision seemed designed to appear within Section 403(d)(4), perhaps as subsection (E).

Conclusion

In my view, the FAIR Act is a constitutionally sound solution to a problem that clearly demands a remedy that only Congress can provide. I look forward to working with the Committee and answering any questions it may have.